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## FIRST GENERAL COUNSEL'S REPORT

MUR 6407

DATE COMPLAINT FILED: Oct. 25, 2010

DATE OF NOTIFICATION: Nov. 1, 2010

DATE OF LAST RESPONSE: Dec. 10, 2010

DATE ACTIVATED: Jan. 28, 2011

EXPIRATION OF SOL: June 5, 2015 – Oct. 31, 2015

COMPLAINANT:

Pat Waak, Chairman, Colorado Democratic Party

RESPONDENTS:

Senate Conservatives Fund and Barry Wynn,  
in his official capacity as treasurer  
Buck for Colorado and Kenneth Salazar,  
in his official capacity as treasurer  
Kenneth R. Buck  
Senator James DeMint

RELEVANT STATUTES  
AND REGULATIONS:

2 U.S.C. § 441a(a)(2)  
2 U.S.C. § 441a(f)  
2 U.S.C. § 441a(a)(7)(B)  
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure reports; Commission indices

FEDERAL AGENCIES CHECKED:

None

### I. INTRODUCTION

This matter involves alleged coordination between, on the one hand, the Senate Conservatives Fund ("Fund") and Senator James DeMint, and on the other, Buck for Colorado ("Buck Committee") and Kenneth R. Buck, a candidate for U.S. Senator from Colorado in 2010.<sup>1</sup> The complaint alleges that the Fund, a leadership PAC of DeMint's, made large disbursements reported as independent expenditures in support of Buck around the same time

<sup>1</sup> Buck lost the general election, placing second with 46% of the vote. The winning candidate, Michael Bennett, garnered a 48% share.

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1 that DeMint had endorsed Buck and was campaigning with him. The complaint also notes that  
2 the Fund sent fundraising letters to solicit contributions for Buck and transferred hundreds of  
3 thousands of dollars to Buck in earmarked contributions. The complaint alleges that, under these  
4 circumstances, the reported expenditures appear to have been coordinated. In response, the  
5 Respondents argue that there was no coordination because there are no facts that satisfy the  
6 conduct standard of the Commission's regulations.

7 Upon review of the complaint, responses, and other available information, there appears  
8 to be no basis for concluding that the Buck Committee coordinated with the Fund regarding the  
9 disbursements reported by the Fund as independent expenditures. Therefore, we recommend that  
10 the Commission find no reason to believe that the Senate Conservatives Fund violated 2 U.S.C.  
11 § 441a(a)(2), that Buck for Colorado violated 2 U.S.C. § 441a(f), or that DeMint or Buck  
12 violated the Federal Election Campaign Act of 1971, as amended ("the Act"), and close the file.

## 13 **II. FACTUAL AND LEGAL ANALYSIS**

### 14 **A. Factual Background**

15 The Fund registered with the Commission as a non-connected PAC in April 2008, listing  
16 DeMint as a "Leadership PAC Sponsor."<sup>2</sup> The Fund's website states that it is "chaired by U.S. Sen.  
17 Jim DeMint (R-Scouth Carolina)" and "dedicated to electing strong conservatives to the United States  
18 Senate." <http://senateconservatives.com/site/about>. Between June 5, 2010, and October 27, 2010,  
19 the Fund reported approximately \$440,000 in independent expenditures in support of Buck, with  
20 about 60% of that amount consisting of media advertising/placement and the remainder consisting

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<sup>2</sup> The Statement of Organization lists MINT PAC, another federally registered leadership PAC sponsored by DeMint, as an affiliated committee. MINT PAC's filings with the Commission do not show any contributions, expenditures, or other disbursements in connection with Buck's campaign.

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1 mainly of email list rental/usage.<sup>3</sup> Based on the Fund's independent expenditure reporting and a  
2 search of publicly available sources, it appears that the Fund's advertisements pertaining to the 2010  
3 Colorado Senate race consisted of (1) a 60-second radio ad in mid-July 2010, (2) a 30-second  
4 television ad broadcast in early October 2010, and (3) two disbursements for "web ads" in August  
5 and October 2010. The radio ad promoted Buck's positions on illegal immigration, taxes, and  
6 federal spending, concluding with the following statements: "If those are your values, vote for Ken  
7 Buck in the Republican Senate Primary. For more information, go to senateconservatives.com."  
8 <http://senateconservatives.com/site/post/283/scf-launches-radio-ad-in-colorado>. The television ad  
9 criticized the votes of Buck's opponent, Senator Michael Bennett, on government spending and  
10 health care bills, concluding with the following statement: "Michael Bennett. He's already been in  
11 Washington too long." [http://senateconservatives.com/site/post/342/scf-launches-ad-targeting-](http://senateconservatives.com/site/post/342/scf-launches-ad-targeting-bennet-in-colorado)  
12 [bennet-in-colorado](http://senateconservatives.com/site/post/342/scf-launches-ad-targeting-bennet-in-colorado). We were not able to locate any copies of the Fund's "web ads."

13 The complaint bases its coordination allegations on these facts: (1) DeMint endorsed Buck  
14 in April 2010; (2) since endorsing Buck, DeMint has actively campaigned with him, including a  
15 July 8, 2010, visit to Denver, Colorado, to "talk to Buck and then join him at a campaign event to  
16 speak on his behalf;" (3) the July 8 event occurred during the Fund's "spending spree" on behalf of  
17 Buck that included a \$29,500 "impendant" expenditure on June 29, 2010, for a "Buck Email List"  
18 and a \$37,750 "independent" expenditure on July 16, 2010, for Buck radio spots;<sup>4</sup> (4) a few weeks  
19 later, the Fund paid for a \$55,150 "media buy to support Buck" (reported as an independent  
20 expenditure for "Radio Placement"); (5) the Fund sent out emails soliciting funds for Buck's

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<sup>3</sup> The Fund reported independent expenditures in 2010 in support of several other Senate candidates, including over \$100,000 on each of six candidates. The Fund also disclosed \$10,000 in direct contributions to the Buck Committee in 2010, exhausting its limit for the primary and general elections. 2 U.S.C. § 441a(a)(2)(A).

<sup>4</sup> It is not clear how the complainant arrived at the \$37,750 figure; the Fund disclosed a \$30,065 expenditure on July 16, 2010, for "Buck-Radio Placement," but reported no other related disbursements on or around that date.

1 campaign "[r]ight before and right after DeMint and Buck campaigned together," and (6) the Fund  
2 transferred \$235,769 in earmarked contributions to the Buck campaign by the end of August 2010.  
3 Complaint at 2-4.

4 The complaint cites several publicly available sources to support its allegations, focusing on  
5 a statement reportedly made by DeMint regarding the Fund's independent expenditures: "He [Buck]  
6 can't know what I'm doing [and] I don't know what they're [the Buck campaign] doing except what  
7 I find out on their website." Manu Raju, *DeMint PAC fills primary coffers*, POLITICO, Aug. 10,  
8 2010 ("POLITICO article"). The complaint alleges that, in fact, DeMint knew what Buck was doing  
9 "because he was there in Denver doing it with him." Complaint at 4. The article states that Buck  
10 and DeMint "said they have had no conversations about DeMint's financial investment in the race,  
11 denying there was any discussion about the [radio] ad buy." POLITICO article. DeMint also  
12 reportedly stated that "he's doing everything lawfully and that he's got 'legal people all over this'"  
13 to ensure that the Fund operates in compliance with federal law, and a spokesman for Buck  
14 reportedly stated that the radio ad "is something we learned about when it was aired." *Id.*

15 Another article cited in the complaint contains several quotes from DeMint and Buck from  
16 their speeches at the July 8, 2010, campaign event, none of which reference any independent  
17 expenditures or communications planned by the Fund. Joseph Bowen, "DeMint joins Buck in  
18 bucking Republican establishment candidates," COLORADO INDEPENDENT, July 9, 2010.<sup>5</sup>  
19 Regarding DeMint's fundraising emails (copies of which are included in a blog cited in the  
20 complaint), two of them focus solely on Buck's campaign and solicit contributions to Buck through  
21 the Fund's website, and one mentions several Senate candidates being supported by the Fund

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<sup>5</sup> Video recordings of both speeches are available on YouTube. See <http://www.youtube.com/watch?v=da77fNEs2Ho> (DeMint speech); <http://www.youtube.com/watch?v=UjjoElciFM&feature=related> (Buck speech).

1 "[t]hrough direct contributions, independent expenditure campaigns, and campaign donation  
2 bundling efforts." <http://www.desertconservative.com>. The emails do not describe the Fund's  
3 independent expenditure plans or contain any facts suggesting any contacts between DeMint and the  
4 Fund, on the one hand, and Buck and the Buck Committee, on the other.

5 In response to the complaint, the Fund contends that "an appearance or even more than  
6 one appearance" by Senator DeMint at a Buck campaign event "does not come close" to  
7 satisfying the contact prong of the Commission's regulations. Fund Response at 1. The Fund  
8 states that its communications (1) were not made at the "request or suggestion" of the Buck  
9 campaign; (2) were not created, produced, or distributed at the Fund's suggestion with the  
10 "assent" of Buck or his campaign; (3) were not made with the "material involvement" of Buck or  
11 his campaign and that all material information was based upon and obtained from publicly  
12 available sources; and (4) were not based upon "substantial discussions" with Buck or his  
13 campaign. *Id.* at 1-2. Also, there were no common vendors or independent contractors between  
14 the Fund and the Buck campaign, and the Fund did not republish, distribute, or disseminate  
15 materials from the Buck campaign. *Id.* at 2. Senator DeMint did not submit a response;  
16 however, the Fund's response indicates that it was "cc'd" to DeMint. *Id.* at 3.

17 Buck and the Buck Committee similarly deny that they coordinated the expenditures at  
18 issue with the Fund. The response includes affidavits from Buck and the Buck Committee's  
19 treasurer Ken Salazar, who has served as treasurer since April 2009. Both individuals state that  
20 they "did not cooperate with, consult with, act in concert with, request, or suggest that" DeMint  
21 or the Fund make any public communications supporting Buck's candidacy, and that no person  
22 acting on behalf of Buck or the Buck Committee "cooperated with, consulted with, acted in

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1 concert with, requested, or suggested that" DeMint or the Fund make any public communications  
2 supporting Buck's candidacy. Attachments to Buck Committee Response.

3 The Buck Committee asserts that the complaint's interpretation of the law "would require  
4 the Commission to exceed its statutory authority by treating any payment as [a coordinated]  
5 expenditure merely because the person making the expenditure has a close relationship with the  
6 candidate." Buck Committee Response at 2. The response concludes that it is improper for the  
7 Commission to open an investigation "when the only facts contained in the complaint are  
8 evidence of lawful and constitutionally protected behavior." *Id.* at 3.

9 **B. Legal Analysis**

10 The central issue in this matter is whether advertisements paid for by the Fund in support of  
11 candidate Kenneth Buck were, in fact, independent expenditures, as reported, or whether they were  
12 coordinated with the Buck Committee. The complaint alleges that because DeMint and Buck were  
13 actively campaigning together in Colorado during Buck's candidacy, and in light of other campaign  
14 assistance provided by DeMint and the Fund (e.g., fundraising emails from DeMint; forwarding of  
15 earmarked contributions), the disbursements in support of Buck reported by the Fund as independent  
16 expenditures must have been coordinated.

17 The Act provides that no multicandidate committee shall make contributions to any  
18 candidate and his or her authorized political committee with respect to any election for Federal  
19 office, which, in the aggregate, exceed \$5,000. 2 U.S.C. § 441a(a)(2)(A). The Act provides that  
20 an expenditure made by any person "in cooperation, consultation, or concert, with, or at the  
21 request or suggestion of," a candidate or his authorized committee or agent is a contribution to  
22 the candidate. *See* 2 U.S.C. § 441a(a)(7)(B)(i); 11 C.F.R. § 109.20(a).

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1 A communication is coordinated with a candidate, an authorized committee, a political  
2 party committee, or an agent of any of the foregoing when the communication is (1) paid for, in  
3 whole or part by a person other than that candidate, authorized committee, or political party  
4 committee; (2) satisfies at least one of the content standards<sup>6</sup> described in 11 C.F.R. § 109.21(c);  
5 and (3) satisfies at least one of the conduct standards described in 11 C.F.R. § 109.21(d).

6 11 C.F.R. § 109.21(a)(1) – (3). In contrast, an independent expenditure is an expenditure by a  
7 person for a communication expressly advocating the election or defeat of a clearly identified  
8 candidate that is not made in cooperation, consultation, or concert with, or at the request or  
9 suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party  
10 committee or its agents. 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

11 In this matter, the first prong of the coordinated communication test is satisfied because the  
12 Fund is a third-party payor. The second prong of the test, the content standard, appears to be  
13 satisfied in two ways: (1) the text of the radio ad contains "magic words" express advocacy ("Vote  
14 for Ken Buck"), see 11 C.F.R. §§ 100.22(a) and 109.21(c)(3), and (2) the ad clearly identified Buck  
15 and appears to have been broadcast in Colorado starting in mid-July 2010, well within 90 days of the  
16 August 16, 2010, primary election. See 11 C.F.R. § 109.21(c)(4)(i). Thus, whether or not the  
17 Fund's communications were independent expenditures or coordinated communications hinges on  
18 an analysis of the conduct prong of the test.

19 The conduct prong may be satisfied when, *inter alia*, (1) a communication is created,  
20 produced, or distributed at the request or suggestion of the candidate or his or her authorized

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<sup>6</sup> The Commission recently revised the content standard in 11 C.F.R. § 109.21(c) in response to the D.C. Circuit's decision in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). The Commission added a new standard to the content prong of the coordinated communications rule. 11 C.F.R. § 109.21(c)(5) covers communications that are the functional equivalent of express advocacy. See *Explanation and Justification for Coordinated Communications*, 75 Fed. Reg. 55947 (September 15, 2010). The effective date of the new content standard is December 1, 2010, after the events at issue in this matter. The new standard would not change the analysis in this Report.

committee, or at the suggestion of the person paying for the communication, and the candidate or his or her committee assents to that suggestion; (2) the candidate or his or her authorized committee is materially involved in certain decisions regarding the communication; or (3) the communication is created, produced, or distributed after one or more substantial discussions about the communication between the candidate and his or her authorized committee and the payor or his or her agents.

11 C.F.R. § 109.21(d)(1)-(3).

Based on a review of the available information, including the complaint and publicly available sources, it appears that DeMint appeared with Buck only once during the period at issue, at a July 8, 2010, campaign event in Denver. DeMint and Buck both gave speeches at the event that were recorded and made publicly available, *see* fn.5, *supra*; however, there is no indication that the two men or their staffs discussed public communications planned by the Fund at that time or any other time. Specifically, there is no allegation or information linking DeMint's appearance with Buck to the Fund's public communications, such as statements by Buck that requested or suggested that the Fund run advertisements on his behalf, or information indicating that Buck assented to the Fund's suggestion that it create, produce, or distribute ads in support of his campaign. In fact, the only reference to the Fund's expenditures in support of Buck that we found appeared in a fundraising email in which DeMint discussed the Fund's independent expenditure campaigns in support of several candidates for U.S. Senate. *See supra* at pp. 4-5. However, there is no information in the email, or any other available document or source, suggesting that DeMint or the Fund coordinated the expenditures at issue with Buck or his campaign. Moreover, the responses, which include affidavits by Buck and his campaign treasurer, deny that any of the conduct prongs were satisfied or that the Buck Committee cooperated with, consulted with, acted in concert with, or requested or suggested that DeMint or the Fund make any public communications supporting Buck's candidacy.

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Given the Respondents' denials, the speculative nature of the complaint, and the absence of any other information suggesting coordination, the conduct prong of the coordinated communications regulations has not been met, thus, there appears to be no resulting violation of the Act. Therefore, we recommend that the Commission find no reason to believe that the Senate Conservatives Fund and Barry Wynn, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2), that Buck for Colorado and Kenneth Salazar, in his official capacity as treasurer, violated 2 U.S.C. § 441a(f), or that Senator James DeMint or Kenneth R. Buck violated the Act.


**III. RECOMMENDATIONS**

1. Find no reason to believe that the Senate Conservatives Fund and Barry Wynn, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2).
2. Find no reason to believe that Buck for Colorado and Kenneth Salazar, in his official capacity as treasurer, violated 2 U.S.C. § 441a(f).
3. Find no reason to believe that Senator James DeMint violated the Act.
4. Find no reason to believe that Kenneth R. Buck violated the Act.
5. Approve the attached Factual and Legal Analyses.
6. Close the file.
7. Approve the appropriate letters.

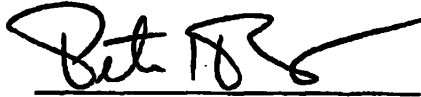
Christopher Hughey  
Acting General Counsel

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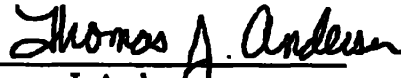
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Stephen A. Gura  
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